Supreme Court U.S.

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No. 01- 01 116 JUL 19 2001

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IN THE

Supreme Court of the United States

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Political subdivisions created and operated under Article XVI, Section 59 of the Texas Constitution — like the Petitioner, El Paso County Water Improvement District No. 1 — manage, conserve, and reclaim the natural resources of the State of Texas. Are these political subdivisions arms of the State for purposes of Eleventh Amendment immunity from suit in federal court?

2. When state law clearly characterizes a political subdivision — like the Petitioner, El Paso County Water Improvement District No. 1 — as an arm of the state, is it necessary to apply a multi-factor test before holding the political subdivision immune from suit in federal court under the Eleventh Amendment immunity?

3. When a federal court has held that a political subdivision is an arm of the state entitled to Eleventh Amendment immunity — like the Petitioner, El Paso County Water Improvement District No. 1 — is it necessary in a subsequent suit to re-examine whether such political subdivision is immune from suit under the Eleventh Amendment?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, El Paso County Water Improvement District No. 1, is a political subdivision created under Article XVI, Section 59 of the Texas Constitution.

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OPINIONS BELOW

Copies of the following lower court opinions are reprinted in the Appendix to this Petition:

- *Southwestern Bell Tel. Co. v. City of El Paso*, 243 F.3d 936 (5th Cir. 2001) (App. A); and

- *Southwestern Bell Tel. Co. v. City of El Paso*, No. EP-98-CA-114-EP (W.D. Tex. May 17, 2000) (unpublished order) (App. B).

The following opinions directly conflict with the lower court opinions and are also reprinted in the Appendix to this Petition:

- *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, No. P-98-CA-27 (W.D. Tex. Nov. 13, 1998) (unpublished) (App. D); and

- *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d 208 (5th Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 177, 148 L. Ed. 2d 121 (2000) (App. E).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 19, 2001. The Fifth Circuit denied Petitioner's Petition for Rehearing En Banc on April 25, 2001 (App. C). Jurisdiction is authorized by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eleventh Amendment, which states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

This case also questions the applicability of Eleventh Amendment immunity to political subdivisions created under Article XVI, Section 59 of the Texas Constitution. Section 59(a) provides:

> The conservation and development of all natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties, and the Legislature shall pass all such laws as may be appropriate thereto.

TEX. CONST. art. XVI, § 59(a).

Section 59(b) of the Texas Constitution provides:

> There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.

TEX. CONST. art. XVI, § 59(b).

STATEMENT OF THE CASE

The Respondent, Southwestern Bell Telephone Company ("Southwestern Bell"), originally brought this suit for injunctive and declaratory relief against the City of El Paso, alleging that a city ordinance violated state utility and federal telecommunication laws. R.80-93. Southwestern Bell eventually settled its claims with the City of El Paso, which is not a party to this appeal.

Southwestern Bell also sued the Petitioner, the El Paso County Water Improvement District No. 1 ("the District"), a political subdivision of the State of Texas, under 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. §§ 2201-02, § 1343 (Declaratory Judgment Act). R.76. According to Southwestern Bell, the District violated 47 U.S.C. § 253a (the Federal Telecommunications Act) by assessing a fee for applications to cross or use the District's rights-of-way. R.76, 99.

On December 1, 1999, the District moved to dismiss Southwestern Bell's claims based on Eleventh Amendment immunity, urging the district court to apply *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, No. P-98-CA-27 (W.D. Tex. Nov. 13, 1998) (unpublished), which holds that the District is immune from suit in federal court as an arm of the State of Texas. R.536-41, 641. On April 10, 2000, the Fifth Circuit affirmed the *Ysleta* order of dismissal in an initially unpublished opinion. *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d 208 (5th Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 177, 148 L. Ed. 2d 121 (2000).

Nonetheless, the district court in this case rejected *Ysleta* and, on May 17, 2000, denied the District's motion to dismiss based on Eleventh Amendment immunity. R.2032-41. On June 9, 2000, the District timely appealed based on the collateral order doctrine. R.2052; *see also* FED. R. APP. P. 4(a)(1)(A); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147, 113 S. Ct. 684, 689, 121 L. Ed. 2d 605 (1993). On August 9, 2000, the Fifth Circuit ordered that its opinion in *Ysleta* be published.

Despite this controlling authority, on March 19, 2001, another panel of the Fifth Circuit issued a published opinion affirming the district court's order in this case and finding the District was ***not*** protected by Eleventh Amendment immunity. On April 25, 2001, the Fifth Circuit denied the District's petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Panel's Misunderstanding of the Eleventh Amendment Immunity Test Destroys *Stare Decisis* and Threatens the Power of States to Shield Their Instrumentalities from Suit in Federal Court.

The Fifth Circuit panel that rendered the judgment in this case erred when it retracted the District's status as an arm of the State of Texas entitled to Eleventh Amendment immunity solely because the trial court and a different Fifth Circuit panel did not apply a multi-factor test. Where the nature of the political subdivision is clear from state law providing for its creation, there is no necessity or reason to apply a multi-factor test. And once the nature of the political subdivision is established under federal law, there is no need to apply and reapply the multi-factor test each time the political subdivision is named as a defendant in a federal lawsuit.

The District is an arm of the State of Texas as an agency created and operated under Article XVI, Section 59 of the Texas Constitution. *See Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 814 (Tex. 1993). Like hundreds of other political subdivisions created under the same constitutional provision, the District has enjoyed — and should continue to enjoy — Eleventh Amendment immunity from suit in federal court. Although the Fifth Circuit had consistently recognized Eleventh Amendment immunity for political subdivisions created under Article XVI, Section 59, the Fifth Circuit panel in this case diverted from its own precedent, creating a new and unanticipated direction in the law of Eleventh Amendment immunity.

Before the panel decision was rendered in this case, the Fifth Circuit routinely applied a multi-factor test, but only to determine whether political subdivisions formed under the laws of other states or under different provisions of Texas law possessed Eleventh Amendment immunity. *See, e.g., Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147 (5th Cir. 1991) (considering six factors to Louisiana political subdivision); *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 438-42 (5th Cir. 1985) (same); *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982) (applying factors to Texas political subdivision). Other circuits frequently apply a multi-factor test, although the number of factors is far from uniform. *See* Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1269-71 (1992) (noting the number of factors considered by the circuits ranges anywhere from two to nine).

In addition to applying its own multi-factor test, the Fifth Circuit acknowledged that when state law clearly classifies a political subdivision as an arm of the state, it is unnecessary to consider the multi-factor test before applying Eleventh Amendment immunity to that political subdivision. *See, e.g., Kamani v. Port of Houston Auth.*, 702 F.2d 612, 613 (5th Cir. 1983). Likewise, the Fifth Circuit acknowledged that when a federal court examined a political subdivision's status and determined its right to Eleventh Amendment immunity, it was thereafter unnecessary to revisit the factors that initially supported application of the Eleventh Amendment. *See, e.g., Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104-05 (5th Cir. 1995).

The Fifth Circuit specifically declined to routinely apply the multi-factor test when discussing the Eleventh Amendment status of Article XVI, Section 59 political subdivisions like the District:

> Fortunately, the Fifth Circuit's apparent "bright-line" test established in *Pillsbury* makes it unnecessary for this Court to engage in either the *Delahoussaye/Jacintoport* or the *Hess* [*v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994)] analyses to determine whether EPCWID is an entity whose nexus with the state entitles it to assert sovereign immunity. . . . The Court will therefore apply the *Kamani/Guillory/Pillsbury* approach regarding entities created under Article XVI, section 59 of the Constitution of the State of Texas in this case. Thus, EPCWID is entitled to Eleventh Amendment immunity by virtue of how it was created and is operated.

See Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1, No. P-98-CA-27, slip op. at 10 (W.D. Tex. Nov. 13, 1998) (unpublished), *aff'd*, 222 F.3d 208 (5th Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 177, 148 L. Ed. 2d 121 (2000).

A bright-line test benefits judicial efficiency and provides fairness and predictability for political subdivisions that are created and operated under similar statutory or constitutional provisions. This result also satisfies this Court's observation that the most critical element of Eleventh Amendment immunity is a state's own characterization of its agency or political subdivision. *See Regents of the Univ.*

of Cal. v. Doe, 519 U.S. 425, 430 n.5, 117 S. Ct. 900, 903 n.5, 137 L. Ed. 2d 55 (1997).

The Texas constitutional provision — Article XVI, Section 59 — authorizes the creation of a variety of political subdivisions that perform only state governmental functions for the conservation and reclamation of the state's precious natural resources. *See generally Bennett v. Brown County Water Improvement Dist. No. 1*, 153 Tex. 599, 607, 272 S.W.2d 498, 502-03 (1954). Districts created under Article XVI, Section 59 "are all designed to effectuate the same objectives, that is, the conservation and utilization of the natural resources of the state in which ***all the public*** are interested." *Sears v. Colorado River Municipal Water Dist.*, 487 S.W.2d 810, 811 (Tex. Civ. App. – Eastland 1972, writ ref'd n.r.e.) (emphasis added); *see also* TEX. WATER CODE ANN. § 49.211(b) (Vernon 2000) (extending the District's authority beyond the boundaries of El Paso County). The Texas Supreme Court has stated that a conservation and reclamation district is "a State governmental agency." *Lower Neches Valley Auth. v. Mann*, 140 Tex. 294, 299-300, 167 S.W.2d 1011, 1014 (1943).

Relying on and reaffirming its decision in *Bennett*, the Texas Supreme Court held in *Guillory v. Port of Houston Authority*, 845 S.W.2d 812, 814 (Tex. 1993), that Article XVI, Section 59 political subdivisions are entirely governmental in function:

> In *Bennett* we held that governmental units created under Article XVI, Section 59 of the Texas Constitution are entirely governmental in function. Water improvement districts and other agencies created under this constitutional provision are

> different from municipalities in that the former are created by the legislature for general public purposes, while the latter are created by consent of their inhabitants.

More recently, in *Loyd v. Eco Resources, Inc.*, 956 S.W.2d 110, 122 n.4 (Tex. App. – Houston [14th Dist.] 1997, no writ), the court defined "governmental function" as "an activity that is carried out by an arm of the state for the purpose of serving the general public." The court also stated, "Water districts and like entities created under section 59 of article XVI of the Texas Constitution can ***only*** perform governmental functions." *Id.* at 122 (emphasis added). Thus, by performing governmental functions, water districts and other political subdivisions created under Article XVI, Section 59 are arms of the state. *See id.*

In discharging their governmental functions, Article XVI, Section 59 water districts, "as agents of the State, are essentially exercising the State's and their own police power, which has been defined as a 'grant of authority from the people to their governmental agents for the protection of the health, the safety, the comfort and the welfare of the public.' " *Banker v. Jefferson County Water Control & Improvement Dist. No. 1*, 277 S.W.2d 130, 133 (Tex. Civ. App. – Beaumont 1955, writ ref'd n.r.e.) (quoting *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513, 515 (1916)). This grant of authority and governmental function is particularly true regarding the history, formation, and nature of the District in this case:

> The plaintiff District was established in 1917 under the authority of a Texas Statute. Later it was converted into a conservation and reclamation district under the Constitution of Texas,

> [TEX. CONST. art. XVI, § 59], but without any change in name. Under the statute, it has a broad right of eminent domain and the authority hereby conferred shall authorize and empower such districts to condemn all lands, private and public, for the purpose herein indicated, beyond the boundary of such districts and in any county within the State of Texas, and it also has the power of taxation. In fact, such districts and various other similar districts are not classed with municipal corporations, but are held to be political subdivisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law.
>
> ***It is not only an arm of the State, but is fashioned to perform public service and duties of high importance in the welfare of the people of Texas.***

El Paso County Water Improvement Dist. No. 1 v. City of El Paso, 133 F. Supp. 894, 914 (W.D. Tex. 1955) (emphasis added), *reformed in part, aff'd in part*, 243 F.2d 927 (5th Cir.), *cert. denied*, 355 U.S. 820 (1957).

It seems beyond dispute, in light of Texas state law, that the District is an arm of the State of Texas immune from suit in federal court. *See Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.2d at 104 (holding that a political subdivision which is "a creature of state law and a political subdivision of the State of Texas" is "entitled to Eleventh Amendment immunity"). Furthermore, under federal precedent, the District is an arm of the State of Texas

immune from suit in federal court. *See Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d at 208; *Kamani v. Port of Houston Auth.*, 702 F.2d at 613.

Prior to this case, the Article XVI, Section 59 conservation and reclamation districts had enjoyed Eleventh Amendment immunity from suit in federal court consistent with this Court's opinion in *Regents of the University of California v. Doe*, 519 U.S. at 430 n.5, 117 S. Ct. at 903 n.5. *See, e.g., Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d at 104 (recognizing the unique status of political subdivisions created under Article XVI, Section 59 of the Texas Constitution); *Kamani v. Port of Houston Auth.*, 702 F.2d at 613 (characterizing a port authority as "a creature of state law" entitled to immunity from suit under the Eleventh Amendment); *McCrea v. Harris County Houston Ship Channel Navigation Dist.*, 423 F.2d 605, 607 (5th Cir. 1970) (defining a navigation district created under Article XVI, Section 59 to be "a creature of state law"). The District has enjoyed Eleventh Amendment immunity as an Article XVI, Section 59 political subdivision. *See, e.g., Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d at 208.

In this case, however, a panel of the Fifth Circuit erroneously concluded that the multi-factor test must be applied in every instance where a defendant asserts Eleventh Amendment immunity from suit in federal court. This conclusion is a radical departure from Fifth Circuit precedent, and it ignores state law recognizing that Article XVI, Section 59 political subdivisions are arms of the state of Texas. More particularly, the Fifth Circuit's opinion erroneously retracts the District's previously existent Eleventh Amendment immunity.

Significantly, this Court has cautioned that the determination of Eleventh Amendment immunity is a question of federal law, "[b]ut that federal question can be answered only after considering the provisions of state law that define the agency's character." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. at 430 n.5, 117 S. Ct. at 903 n.5; *see also Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982) ("A federal court must examine the particular entity in question and its ***powers and characteristics as created by state law*** to determine whether the suit is in reality a suit against the state itself."). It is pointless to require the repeated application of a multi-factor test each time a particular political subdivision claims Eleventh Amendment immunity, particularly when the Fifth Circuit has determined the nature of the political subdivision. It is also pointless to apply the multi-factor test when the state constitution clearly defines the character of the political subdivision at issue. The decisions of this Court do not require the inconsistent, unpredictable results generated by the Fifth Circuit's new approach to Eleventh Amendment immunity.

II. The Federal Issue Is Important: Hundreds of Political Subdivisions Throughout Texas Will Improperly Be Denied Eleventh Amendment Immunity.

The constitutional subdivisions created under Article XVI, Section 59 are state agencies that have long-relied on the Texas Supreme Court and the Fifth Circuit to define the scope of their duties and immunities. *See, e.g., Lower Neches Valley Auth. v. Mann*, 140 Tex. at 299-300, 167 S.W.2d at 1014; *Kamani v. Port of Houston Auth.*, 702 F.2d at 613; *El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. at 914. Any unpredictable course in

the development of Eleventh Amendment law affects not only the District, but also countless governmental subdivisions created under Article XVI, Section 59 of the Texas Constitution. *See, e.g.*, TEX. AGRIC. CODE ANN. § 78.011(a) (Vernon 1995) (noxious weed control district); *id.* § 202.003 (Vernon 1982) (wind erosion district); TEX. HEALTH & SAFETY CODE ANN. § 402.011(a) (Vernon 1992) (radioactive waste disposal authority); TEX. WATER CODE ANN. § 36.011(a) (Vernon 2000) (groundwater conservation district); *id.* § 51.011 (Vernon 2000) (water control and improvement district); *id.* § 53.088 (Vernon Supp. 2001) (fresh water supply district); *id.* § 55.021 (Vernon 1972) (water improvement district); *id.* § 56.011 (Vernon 1972) (drainage district); *id.* § 57.011 (Vernon 1988) (levee improvement district); *id.* § 58.011 (Vernon 1988) (irrigation district); *id.* § 62.021 (Vernon 1988) (navigation district); *id.* § 64.001 (Vernon 1988) (water import authority); *id.* § 66.011 (Vernon 1988) (storm water control district).

The Fifth Circuit's opinion in this case, which requires application of the multi-factor test even in instances where the Texas Constitution clearly describes the character of the political subdivision at issue, is contrary to this Court's direction and has produced an absurd result: In one case, the District is protected by Eleventh Amendment immunity; but, in another case, it is denied the same protection. In future lawsuits, will another Fifth Circuit panel make yet another determination of the District's Eleventh Amendment immunity? Given the large number of Article XVI, Section 59 subdivisions and the constant threat of suit in federal courts, the question presented by this Petition is critical to the law of Eleventh Amendment immunity, not merely in Texas.

III. The District Qualifies for Eleventh Amendment Immunity Even If the Multi-Factor Test is Applied.

A political subdivision created under Article XVI, Section 59 is entitled to Eleventh Amendment immunity because the Texas Constitution establishes such political subdivisions as arms of the State of Texas with statewide, governmental duties. Nevertheless, even if the Court were to strictly apply the multi-factor test, the District would qualify for Eleventh Amendment immunity. Whether a particular state agency is an arm of the state entitled to Eleventh Amendment is a question of federal law "answered only after considering the provisions of state law that define the agency's character." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. at 430 n.5, 117 S. Ct. at 903 n.5. Under Texas state law, the District is essentially a state agency. *See Guillory v. Port of Houston Auth.*, 845 S.W.2d at 814; *Bennett v. Brown*, 272 S.W.2d at 503; *Lower Neches Valley Auth. v. Mann*, 167 S.W.2d at 1014; *Sears v. Colorado River Municipal Water Dist.*, 487 S.W.2d at 811.

The State of Texas maintains strong control over the District. *See, e.g.*, TEX. WATER CODE ANN. § 12.081 (Vernon 2000) (describing general supervision); *id.* § 49.194 (describing financial supervision). The state does not directly fund the District, but the state determines the feasibility of any District project and supervises the issuance of bonds. *Id.* § 49.181, § 49.184. Furthermore, the state has the general obligation to repay bonds issued at the District's request by the Water Development Board. *Id.* § 17.026. Upon dissolution, the District's assets escheat to the state. *Id.* § 49.327.

While the District may own property and sue or be sued in its own name (*id.* § 49.066(a), § 49.211(b)), the District

exists solely — pursuant to Article XVI, Section 59 — to serve the political mandate of "preservation and conservation of all natural resources of the state." *Id.* § 51.121(b). The District's authority is ***not*** limited to the boundaries of El Paso County. *Id.* § 49.211(b).

If the multi-factor test were applied to the District (which the District maintains is not necessary), then the facts supporting those factors would collectively and conclusively demonstrate that the District is an arm of the State of Texas entitled to Eleventh Amendment immunity. Both the trial court in this case and the panel of the Fifth Circuit that considered this appeal erred, to the detriment of the District, Eleventh Amendment law, and the right of states to determine the status of the political subdivisions they create.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be granted. Alternatively, the Court should summarily reverse the judgment of the Fifth Circuit and render judgment in accordance with *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d 208 (5th Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 177, 148 L. Ed. 2d 121 (2000).

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